No. 84152-7

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE THE DETENTION OF ROBERT DANFORTH,

STATE OF WASHINGTON,

Respondent,

v.

ROBERT DANFORTH,

Petitioner.

SUPPLEMENTAL BRIEF OF PETITIONER

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A. INTRODUCTION

Robert Danforth is a 64-year-old, mildly retarded man who has not committed any crimes since 1987, and who lived in the community crime-free from 1996-2006. In October of 2006, he went to the King County Sheriff's office and asked for help because he had a bad dream and was afraid he might reoffend. Two mental health professionals ("MHPs") from King County Crisis and Commitment Services spoke with Mr. Danforth. Mr. Danforth told them that he needed to be committed because he desires children sexually. He said, "If I'm not locked up, I could re-offend." The MHPs reported that Mr. Danforth "said he nearly went to South Center to the arcade but came here for help instead."

The MHPs declined to help Mr. Danforth, concluding that they could not even admit him for a 72-hour mental health evaluation because they did not have probable cause to believe Mr. Danforth was mentally ill and dangerous. But the same statements that did not constitute probable cause to commit Mr. Danforth for 72 hours were later used to commit him for life as a "sexually violent predator".

This Court should reverse the commitment order because Mr. Danforth's requests for help do not constitute "threats" under the plain meaning of the "recent overt act" statute, and if they do, the statute violates due process and the First Amendment.

B. ISSUES PRESENTED

1. "Recent overt act" means "any act or threat that has either caused harm of a sexually violent nature or creates a reasonable apprehension of such harm in the mind of an objective person who knows the history and mental condition of the person engaging in the act." A threat is "an expression of an intention to inflict harm on another." Robert Danforth, a former sex offender who had lived in the community crime-free for a decade, walked into the Regional Justice Center and asked for help because he had a dream involving teenaged boys and feared he would go to a video arcade and "rub up against boys" if the authorities did not help him. Instead of helping him, the State petitioned for his commitment as a sexually violent predator, alleging that his statements at RJC constituted a recent overt act. Were Mr. Danforth's requests for help a recent overt act?

2. A statute is overbroad under the First Amendment if it prohibits threats but does not limit the prohibition to "true threats," which are statements expressing an intention to inflict bodily harm or take the life of a specific individual or group of individuals. In 2001, the Legislature amended the definition of "recent overt act" in the SVP statute to include not only "acts" but also "threats". The lower courts construed the amendment to apply to Mr. Danforth's statements that he wanted help so

he could avoid harming teenaged boys. Is the statute, as construed by the lower courts, unconstitutionally overbroad?

3. A statute is void for vagueness under the Due Process Clause and the First Amendment if it either (1) does not define its terms with sufficient definiteness that ordinary people can understand what conduct is proscribed, or (2) does not provide ascertainable standards to protect against arbitrary enforcement. Is the "threat" prong of the "recent overt act" definition unconstitutionally vague because it does not provide sufficient notice that a request for help like Mr. Danforth's will be considered a threat?

C. STATEMENT OF THE CASE

The Statement of the Case is set forth in the Petition for Review at pages 3-12.

D. SUPPLEMENTAL ARGUMENT

The arguments set forth below supplement the arguments made at pages 12-20 of the Petition for Review.

1. **Mr. Danforth's requests for help do not constitute threats under the plain meaning of the statute and are not "true threats" as limited by the First Amendment.**

a. A threat is an expression of an intention to inflict harm.

In 2001, the Legislature amended RCW Ch. 71.09, expanding the definition of "recent overt act" to include not only acts, but also "threats":

> "Recent overt act" means any act or threat that has either caused harm of a sexually violent nature or creates a reasonable apprehension of such harm in the mind of an objective person who knows of the history and mental condition of the person engaging in the act.

Laws of 2001, ch. 286, § 4; former RCW 71.09.020 (10) (emphasis added).[1]

Because of the significant liberty interest at stake, civil commitment statutes must be strictly construed. In re Detention of LaBelle, 107 Wn.2d 196, 205, 728 P.2d 138 (1986). Although the word "threat" is now a part of the "recent overt act" definition in the commitment statute, "threat" itself is not separately defined. Where a statute does not define a word, courts discern its ordinary meaning from the dictionary. Harry v. Buse Timber & Sales, Inc., 166 Wn.2d 1, 201 P.3d 1011, 1019 (2009). The dictionary defines "threat" as an "expression of an intention to inflict loss or harm on another." Webster's Third New International Dictionary at 2382 (2002).

The "threat" portion of the statute must also be construed with First-Amendment limitations in mind. State v. Johnston, 156 Wn.2d 355, 359, 127 P.3d 707 (2006); U.S. Const. amend. I. A "true threat," which the government may proscribe, is "a statement made in a context or under

[1] In 2009, after the events at issue in this case, the Legislature again amended the statute and moved the Recent Overt Act definition to subsection (12). Mr. Danforth will continue to cite the statute as it existed at the time of his commitment.

such circumstances wherein a reasonable person would foresee that the statement would be interpreted as a serious expression of intention to inflict bodily harm upon or take the life of another individual." State v. Williams, 144 Wn.2d 197, 207-08, 26 P.3d 890 (2001). The State may not prohibit or sanction threats that do not meet this definition. State v. Kilburn, 151 Wn.2d 36, 43, 84 P.3d 1215 (2004).

In sum, under both the plain-meaning rule and the First Amendment, a threat is an expression of an intention to inflict harm.

b. Whether a statement is a true threat must be evaluated in light of its context. Both the First Amendment and the commitment statute also require courts to evaluate statements in light of their context to determine whether they are true threats. See Kilburn, 151 Wn.2d at 52-53. In re Detention of Broten, 130 Wn. App. 326, 335, 122 P.3d 942 (2005). Thus, in Kilburn, this Court held that the State presented insufficient evidence to convict the defendant of harassment, even though the defendant said he was "going to bring a gun to school and shoot everyone," because he was giggling and he had always treated the listener nicely in the past. Kilburn, 151 Wn.2d at 52-53. And in Broten, the Court of Appeals noted that an individual's history during release is relevant to the determination of whether the conduct at issue constitutes a recent overt act for purposes of the commitment statute. Broten, 130 Wn. App. at 335; see also former

RCW 71.09.020(10). Accordingly, in ascertaining whether Mr. Danforth's requests for help can be considered threats, this Court must view the statements in light of their context and Mr. Danforth's history.

c. Because Mr. Danforth expressed an intention to *avoid* inflicting harm – and because his expressed intent is consistent with his history – his statements were not true threats. Mr. Danforth's statements were not threats because he expressed an intent not to harm anyone. He told the detective and psychologists that he wanted their help in order to avoid harming others. Mr. Danforth's statements were therefore the opposite of threats.

In reviewing all of the evidence, even in the light most favorable to the State, it is clear that insufficient evidence exists to prove beyond a reasonable doubt that Mr. Danforth's statements were threats. The parties stipulated that Mr. Danforth made the following statements, as reported by the detective and mental health professionals:[2]

- Mr. Danforth "feared that he was going to reoffend." CP 391.
- "Danforth said he fears he would walk to a bus stop with boys and try to have sex." CP 391.
- Mr. Danforth "said that he fears for the safety of a minor child. He talked about a dream that he had last night and that it was a red light for him." CP 393.

[2] (Emphasis in each statement is added).

- Mr. Danforth said, "I want to be in a facility so that I don't reoffend." CP 393.

- Mr. Danforth said that "he thought of going by a school today, but did not want to, since he did not trust himself." CP 393.

- Mr. Danforth said "he nearly went to South Center to the arcade but came here for help instead." CP 413.

These statements express a fear of inflicting harm, whereas a threat is an expression of an intention to inflict harm. Accordingly, Mr. Danforth's statements were not threats as a matter of law.

Even if a person's express statements that he wishes to avoid harming others could somehow be construed as a threat, in this case the context of the statements and Mr. Danforth's history make clear that the statements were not threats. The parties stipulated to the following history and context:

- Mr. Danforth made similar statements in 2002, yet he was not committed and he remained crime-free in the community for another four years. CP 318, 365; see Petition for Review at 4-6.

- At the time of this trial, Mr. Danforth had not committed a crime in over 20 years, including 10 years spent in the community. CP 71; State's Response Brief at 6.

- Mr. Danforth reported to a jail in 1987 and asked to be "written up for anything" so he could be confined. CP 332, 359.

- Mr. Danforth explained to Dr. Lund that he repeatedly requested confinement in order to escape the severe neighborhood harassment he suffered as a result of his "strange looks" and mild retardation. CP 374.

- Mr. Danforth's statement that he would go to an arcade and "uh, find someone and, standing up, uh, using one of the uh, video arcade games, groom the person by rubbing myself on them" was in response to the detective's question as to what Mr. Danforth would do if the crisis counselors declined to help him. CP 399. He followed up the statement by saying, "so therefore I wanted to come down and be committed so I don't offend anymore." CP 406.

- The State's psychologist who wrote Mr. Danforth's presentence report in 1993 stated that "in the 14 years she had worked with him, she had never had any reason to believe that he was a threat to society and considered the reverse to be true." CP 328, 357.

- After listening to the statements at issue in this case, the mental health professionals from King County Crisis and Commitment Services determined that they could not hold Mr. Danforth for a 72-hour evaluation. CP 391-92, 415. Such a hold requires only probable cause to believe a person is mentally ill and dangerous. RCW 71.05.150.

In light of the above context and history, Mr. Danforth's statements that he wanted help in order to avoid inflicting harm are not threats, and cannot form the basis for involuntary commitment under RCW Ch. 71.09.

This Court's decisions in Schaler and Kilburn provide useful comparisons. See State v. Schaler, ___ Wn.2d ___, ___ P.3d___, 2010 WL 2948579 (filed 7/29/10); Kilburn, 151 Wn.2d 36. In Schaler, this Court held the State presented sufficient evidence of a true threat where

the defendant "said that he had been planning his neighbor's death for months," "was pretty specific that he wanted to kill his neighbors ... with his bare hands, by strangulation," repeated his desire to kill his neighbors when the mental health professional tried to ascertain his true intent, said that "next time he was going to get a bunch of guns, and it would be [a] blood bath," and "appeared angry when he made these comments and never said he was not serious or did not mean what he said." Schaler at *1-*2. The context and history of the statements supported the defendant's expressed intention to kill his neighbors. Two months earlier, the defendant had threatened the neighbors with a chain saw and said that "it was obvious that somebody [was] going to die." Id. at *2. Also in Schaler, Crisis Health counselors found probable cause to commit the defendant involuntarily. Id. at *1. This Court held that "the evidence at trial was open to interpretation as to whether Schaler's threats were 'true threats' or a cry for help – but both conclusions were possible." Id. at *8.

The distinctions between Mr. Danforth's case and Schaler could not be more striking. Whereas the defendant in Schaler repeatedly expressed his desire to kill his neighbors, Mr. Danforth repeatedly expressed a fear of harming others and a desire to prevent it. Whereas the defendant in Schaler had previously threatened his neighbors with a chainsaw, Mr. Danforth had previously requested voluntary commitment

using statements similar to those at issue here, and had gone on to remain crime-free in the community for four years after authorities declined to commit him or otherwise help him. And whereas the defendant in Schaler was subjected to involuntary commitment by county crisis counselors, the county crisis counselors who spoke with Mr. Danforth determined they did not even have probable cause to commit him for 72 hours. Thus, under Schaler, Mr. Danforth's statements do not constitute true threats as a matter of law.

In Kilburn, this Court held the State failed to present sufficient evidence of a true threat even though the defendant said, "I'm going to bring a gun to school tomorrow and shoot everyone and start with you," and "there's nothing an AK 47 wouldn't solve." Kilburn, 151 Wn.2d at 38-39. The listener originally thought the defendant might have been joking, but "the more she thought about it the more she became afraid that Kilburn was serious." Id. at 39. Despite the defendant's express statements of intention to harm others and the classmate's increasing fear, this Court reversed for insufficient evidence of a true threat because the defendant was "half smiling" when he said he was going to shoot everyone, and he began giggling after making the statement. Id. at 52. Also, the defendant and the listener had known each other for two years and the defendant had always treated her nicely. Id. Thus, even looking

at all of the evidence in the light most favorable to the State, there was insufficient evidence of a true threat. Id. at 54.

If the statements in Kilburn were not true threats, the statements Mr. Danforth made certainly were not. Mr. Danforth expressed a fear of harming others, not an intention to do so, and his history supports the conclusion that he did not want to harm anyone but merely sought respite from neighborhood harassment and the burden of caring for himself. As this Court stated in Kilburn, the true-threat standard is "a difficult standard to satisfy." Id. at 53. The State has failed to satisfy it in this case.

Indeed, the prosecutor and the trial court recognized Mr. Danforth's statements were cries for help even as they condemned him to indefinite commitment by characterizing the statements as threats. Dr. Lund reported, "I received a telephone call from [the prosecutor] on 10/25/06 regarding Mr. Danforth advising me that Danforth had been involved in an incident in which he contacted law enforcement and reported he was having urges to reoffend and was requesting some kind of intervention to assist him." CP 310, 371. The trial court similarly stated, "There is an irony in all of this, and that is that this man is at least from one vantage point asking for help." 1 RP 62-63.

The State should have helped Mr. Danforth by providing voluntary inpatient treatment under RCW 71.05.050, or by offering the solutions Dr.

Lund recommended in 2002 ("increased social and mental health supports, including provisions for short-term psychiatric hospitalization at times he is in crisis"). CP 370. Instead, Mr. Danforth was involuntarily committed as a sexually violent predator, in violation of the statute, the Due Process Clause, and the First Amendment. This Court should reverse.

d. The State misunderstands the record, the statute, and the First Amendment. The State attempts to argue that summary judgment was properly denied because there was a genuine issue of material fact. State's Response Brief at 18. This claim is false. The parties stipulated to the record, including the record of Mr. Danforth's statements. CP 286-419. The parties' briefs in the trial court reveal no dispute as to the facts. CP 60-77, 138-86. Mr. Danforth did not assign error to any factual findings on appeal, only to the legal conclusion regarding the recent overt act. Appellant's Opening Brief at 3.

There is no dispute about what the statements were. The question is purely legal: whether those statements constitute a "threat" for purposes of the "recent overt act" requirement of RCW Ch. 71.09. See Kilburn, 151 Wn.2d at 54 ("To determine whether a speaker has made a true threat, an appellate court must review the constitutionally critical facts in the record that are necessarily involved in the legal determination whether a

true threat was made"). Because the answer is no, this Court should reverse the denial of summary judgment.

The State also asks this Court to read the word "threat" out of the statute. State's Response Brief at 17. It argues that Mr. Danforth's statements satisfy a separate clause of the "recent overt act" definition, and implies that because that clause is satisfied the "threat" clause does not also have to be satisfied.[3] That separate clause is the requirement of a creation of "reasonable apprehension of [sexually violent] harm in the mind of an objective person who knows of the history and mental condition of the person engaging in the act." State's Response Brief at 17 (quoting RCW 71.09.020). But the State ignores the fact that the thing creating the reasonable apprehension must be an act or threat. Former RCW 71.09.020(10).

Statutes must be construed to give all language effect with no portion rendered meaningless or superfluous. State v. Keller, 143 Wn.2d 267, 277, 19 P.3d 1030 (2001). Therefore, the State is wrong when it declares that "the question is whether Danforth's statement creates a reasonable apprehension." Br. of Resp't at 17 (emphasis added). The words "act or threat" must be given effect, not rendered superfluous.

[3] Mr. Danforth does not concede that the second clause is satisfied. The second clause is not at issue in this appeal because the statements must be "threats" before one even reaches the second clause.

Under the statute, a mere statement that creates apprehension is not a recent overt act; only an "act or threat" that creates apprehension can be a recent overt act. Former RCW 71.09.020 (10).

For the same reason, the State is wrong in declaring that this case is like State v. Halstien, 122 Wn.2d 109, 857 P.2d 270 (1993) and Wisconsin v. Mitchell, 508 U.S. 476, 113 S.Ct. 2194, 124 L.Ed.2d 436 (1993). State's Response Brief at 20-21. Halstien held that the "sexual motivation" criminal enhancement statute was not overbroad, because "[t]he statute does not punish a defendant for having sexual thoughts, but rather punishes the defendant for acting on those thoughts in a criminal manner." Halstien, 122 Wn. At 123 (emphasis in original). Like Halstien, Mitchell dealt with a sentence enhancement for committing a crime with a particular motive (in that case, racial animus). The U.S. Supreme Court upheld the statute, contrasting it with an unconstitutional ordinance in another case: "whereas the ordinance struck down in R.A.V. was explicitly directed at expression (i.e. "speech" or "messages"), the statute in this case is aimed at conduct unprotected by the First Amendment." Mitchell, 508 U.S. at 487 (citing R.A.V. v. St. Paul, 505 U.S. 377, 392, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992)) (emphasis added).

The SVPA, as amended in 2001, is like the laws at issue in Kilburn and R.A.V., not Halstien and Mitchell. The statute explicitly sanctions

threats, not just conduct. Former RCW 71.09.020 (10). Contrary to the State's argument, Mr. Danforth's statements are not mere "evidence" of a threat; they are the alleged threat. Threats may not be sanctioned unless they are true threats. Because Mr. Danforth's statements were not true threats, the summary judgment motion should have been granted.

The State finally concedes that the statute at issue here sanctions threats, but argues that the First Amendment does not apply because "threat" is only "a portion of the recent overt act definition." State's Response Brief at 20. The Court of Appeals adopted this argument (slip op. at 9), but this Court should reject it. The word "threat" is only a portion of the statutes at issue in other First Amendment cases as well. Kilburn, for instance, evaluated a statute with the following elements:

> A person is guilty of harassment if:
> (a) Without lawful authority, the person knowingly threatens:
> (i) To cause bodily injury immediately or in the future to the person threatened or to any other person ... [and]
> (b) The person by words or conduct places the person threatened in reasonable fear that the threat will be carried out....

Kilburn, 151 Wn.2d at 41 (citing RCW 9A.46.020).

Just as the statute at issue in this case has a "reasonable apprehension" prong, the statute at issue in Kilburn had a "reasonable fear" prong. And just as past conduct goes to the "reasonable

apprehension" prong in SVP cases (slip op. at 9; State's Response Brief at 23), past conduct goes to the "reasonable fear" prong of the harassment statute. State v. Ragin, 94 Wn. App. 407, 409-12, 972 P.2d 519 (1999) (evidence of prior bad acts necessary to prove reasonableness of victim's fear when defendant threatened him). But the existence of additional conduct elements does not cure the First Amendment problem with the "threat" portion of the relevant statutes; the threat portion itself must be limited to true threats to pass First Amendment muster. Kilburn, 151 Wn.2d at 43.

Finally, the State suggests that the First Amendment limits only criminal statutes, and does not prevent the government from imposing indefinite civil confinement based on speech. State's Response Brief at 20 n.5. The State ignores one of the seminal First Amendment cases, NAACP v. Claiborne Hardware, 458 U.S. 886, 102 S.Ct. 3409, 73 L.Ed.2d 1215 (1982). In that case, black citizens held a rally at which they urged a boycott of white-owned businesses. The white merchants filed a civil lawsuit seeking injunctive relief and damages for the loss of sales. Id. at 890. The U.S. Supreme Court held that the defendants could not be held liable for their speech because the statements were not "fighting words" or "true threats", even though the speakers issued

warnings like "if we catch any of you going in any of them racist stores, we're gonna break your damn neck." Id. at 902, 928.

Thus, the First Amendment protects speakers from both criminal and civil sanctions for their statements. Claiborne, 458 U.S. at 928. Unless a threat is a true threat, neither civil nor criminal liability may attach. Id.; Watts v. United States, 394 U.S. 705, 708, 89 S.Ct. 1399, 22 L.Ed.2d 664 (1969). Accordingly, the fact that Mr. Danforth is technically suffering civil confinement as opposed to criminal incarceration is beside the point. He may not be sanctioned for his speech, because it does not fall within one of the narrow exceptions to First Amendment protection.

2. If the "threat" prong of the recent overt act statute can be applied to Mr. Danforth's statements, the statute is unconstitutionally vague.

A statute is void for vagueness under the Due Process Clause if it either (1) does not define its terms with sufficient definiteness that ordinary people can understand what conduct is proscribed, or (2) does not provide ascertainable standards to protect against arbitrary enforcement. Bellevue v. Lorang, 140 Wn.2d 19, 30, 992 P.2d 496 (2000); U.S. Const. amend. XIV. Courts are "especially cautious in the interpretation of vague statutes when First Amendment interests are implicated." Id. at 31.

If the definition of "recent overt act" can be applied to Mr. Danforth's request for help, then it is unconstitutionally vague. The word

"threat" does not give notice that statements like Mr. Danforth's will constitute grounds for an SVP commitment petition.

The State asserts that Division Three's opinion in In re Detention of Albrecht, 129 Wn. App. 243, 118 P.3d 909 (2005) ("Albrecht II") forecloses a vagueness challenge. State's Response Brief at 27. To the contrary, the reasoning of Albrecht II supports Mr. Danforth's argument. In that case, the State alleged that the defendant committed a recent overt act when he grabbed a 13-year-old boy and offered him 50 cents to follow him. Id. at 249-50. The defendant argued that the words "reasonable apprehension" were vague and violated due process. Id. at 253. The Court of Appeals rejected that argument, because the language came directly from this Court's decisions in In re Harris, 98 Wn.2d 276, 279, 654 P.2d 109 (1982) and In re Detention of Young, 122 Wn.2d 1, 37, 857 P.2d 989 (1993). Id.

In Harris and Young, this Court defined what type of "recent overt act" the State must prove in order to subject an individual to civil commitment consistent with due process. This Court held the State must prove an "act" which "has caused harm or creates a reasonable apprehension of dangerousness." Harris, 98 Wn.2d at 284-85; Young, 122 Wn.2d at 40. The Legislature subsequently amended the relevant statutes to conform to this definition, requiring the State to prove "any act that has

either caused harm of a sexually violent nature or creates a reasonable apprehension of such harm." Laws of 1995, ch. 216, § 1. Accordingly, the Albrecht II court held the phrase "reasonable apprehension" was not void for vagueness. Albrecht II, 129 Wn. App. at 253.

But Mr. Danforth does not argue that the words "reasonable apprehension" are vague; he argues that the word "threat" is vague if it can be applied to his statements. Unlike the phrase "reasonable apprehension," the word "threat" did not come from Harris and Young. It was added later, and has not yet been reviewed for vagueness – in Albrecht II or in any other case. Additionally, unlike the argument in Albrecht II, Mr. Danforth's vagueness challenge implicates both due process and the First Amendment, and is therefore subject to greater scrutiny. Lorang, 140 Wn.2d at 31. The word "threat" does not survive this scrutiny if it can be applied to Mr. Danforth's statements.

The State also cites Anderson for the proposition that the term "threat" as applied to Mr. Danforth is not unconstitutionally vague. State's Response Brief at 28 (citing In re Detention of Anderson, 166 Wn.2d 543, 211 P.3d 994 (2009)). Anderson is not on point. Like Albrecht II, it had nothing to do with statements or threats. Rather, the defendant in that case "engaged in sexual activity with vulnerable patients" who were incapable of consent. Anderson, 166 Wn.2d at 550

(emphasis added). This Court held that "Anderson's sexual activities could constitute overt acts." Id. This Court did not hold that statements seeking help could constitute recent over acts, or that the word "threat" in RCW 71.09.020 was not unconstitutionally vague.

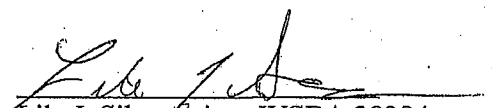
In sum, the statute as amended in 2001 does not provide adequate notice that an individual may be subject to indefinite commitment as a sexually violent predator if he seeks help to avoid reoffending. Thus, if the new definition of "recent overt act" extends to Mr. Danforth's statements, it is unconstitutionally vague. For this reason, too, the order denying summary judgment should be reversed.

E. CONCLUSION

Mr. Danforth respectfully requests that this Court reverse and remand for entry of an order granting summary judgment and dismissing the commitment petition.

DATED this 31st of August, 2010.

Respectfully submitted,



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